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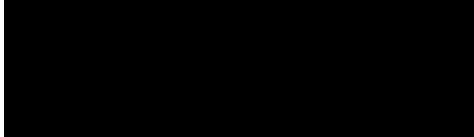
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**U.S. Department of Homeland Security**

**Citizenship and Immigration Services**

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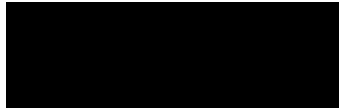
ADMINISTRATIVE APPEALS OFFICE  
CIS, AAO, 20 Mass, 3/F  
425 I Street, N.W.  
Washington, D.C. 20536



File: WAC 01 272 53457 Office: California Service Center

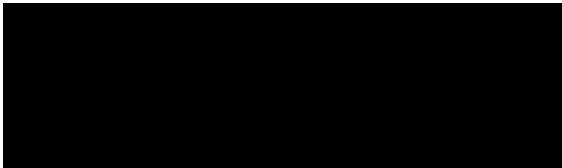
Date: **JAN 27 2004**

IN RE: Petitioner:  
Beneficiary:



Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



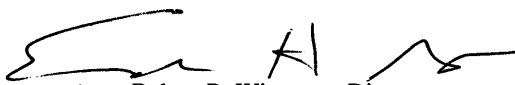
**INSTRUCTIONS:**

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Acting Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The decision of the director will be withdrawn, and the petition will be remanded for further action and consideration.

The petitioner is a Judaic gift shop. It seeks to employ the beneficiary permanently in the United States as president. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The acting director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

8 C.F.R. § 204.5(g)(2) states in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

In this case, the priority date is November 21, 2000. The beneficiary's salary as stated on the labor certification is \$85,000.00 per annum.

Either on initial filing of the petition or in response to a request from the acting director, the petitioner submitted a copy of the petitioner's unaudited financial statement for the period

ending December 31, 2001, a copy of the petitioner's bank statement for the period ending December 31, 2001, and a copy of the petitioner's 2000 Form 1120-A U.S. Corporation Short-Form Income Tax Return, covering the fiscal year from May 1, 2000, to April 30, 2001, which showed compensation of officers of \$0; salaries and wages paid of \$81,250; and a taxable income before net operating loss deduction and special deductions of \$11,816.

The acting director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage and denied the petition accordingly.

On appeal, counsel argues that "non-cash expenses such as depreciation and amortization expenses, may be reflected on a tax return as deductions but really do not reduce the cash income of a business."

In determining the petitioner's ability to pay the proffered wage, CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well-established by both CIS (formerly INS) and judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, the court held CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. at 537; see also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. at 1054.

Beyond the decision of the director, the AAO notes other issues which require the director to review the decision of the then-acting director and see to it that interviews and/or an investigation be conducted.

This petition was filed on July 16, 2001, by Morbev, Inc. located in San Diego, California. The position offered to the beneficiary

was that of president. The petition was signed by Barry Schechter, Director. CIS records show that an I-129 nonimmigrant worker visa petition for H-1 classification (WAC 99 026 52629) filed by Morbev, Inc. (Barry Schechter, President) was approved by the Director, California Service Center, on February 4, 1999. That petition was valid until October 10, 2001.

A petition to extend H-1 classification for the beneficiary (WAC 01 274 51923) was filed by Morbev, Inc. (Barry Schechter, Director) on September 4, 2001, and denied by the Director, California Service Center on February 26, 2002. An appeal was filed which is currently with this office.

On April 12, 2002, another I-129B petition for H-1 classification (WAC 02 159 51917) was filed for the same beneficiary by SVI Training Products Inc. of Carlsbad, California (Barry Schechter, Director). This petition was approved by the Director, California Service Center, on May 17, 2002, and is valid until March 6, 2005.

In light of these various contradictions, the AAO is unable to adjudicate the issue of the petitioner's ability to pay the proffered wage. Several questions must be addressed including whether a valid job offer still exists for the beneficiary; the relationship between Morbev, Inc. and SVI Training Products, Inc.; the inconsistencies in referring to Mr. Schechter as a director and a president; whether the beneficiary is qualified to work in both instances. The director is to determine whether or not a valid job offer really exists in this case.

Finally, in a request for evidence, dated December 13, 2001, the acting director, besides asking for documentation relating to the petitioner's ability to pay the wage, asked for documentation relating to the beneficiary's qualifications for the job. Apparently, the acting director was satisfied with what was presented because this issue is not mentioned in her decision. This is another issue which must be fully considered and addressed. The beneficiary's overseas work experience was all in the newspaper business; the petitioner is a gift shop; according to its website, SVI Training Products, Inc. "is a developer and distributor of PC courseware and skills training products." In view of the seeming differences among these employers, the director must review the requirements of the labor certification and the beneficiary's qualifications to ensure that the beneficiary is qualified for the job offered.

**ORDER:** The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which is to be certified to the AAO for review.